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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.B., et al., Persons Coming Under the Juvenile Court Law.	B291991
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK10188)

APPEAL from an order of the Superior Court of Los Angeles County. Marguerite D. Downing, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Kim Nemoy, Deputy County Counsel, for Defendant and Respondent.

Mother E.M. appeals from the termination of her parental rights to five of her children.[1] The sole argument she raises on appeal is that the court erred in its application of the Indian Child Welfare Act (ICWA) with respect to the three middle children, in that their father, R.E., may have had Native American ancestry which was not properly investigated. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Underlying Facts and Procedure*

Because the sole issue on appeal is ICWA, we provide only the briefest outline of the facts and procedure. This dependency proceeding began when the fourth (the then-youngest) child was born and tested positive for cocaine and cannabinoids. The Department of Children and Family Services (Department) alleged the four children were dependent due to mother's substance abuse. R.E. was the father of the youngest three children; it was alleged that he abused alcohol and marijuana, rendering him incapable of providing the children with regular care and supervision.

The children were declared dependent and placed outside the home. Both parents were granted reunification services. At one point, the relationship between mother and father terminated, and mother began living with her new boyfriend, with whom she would have her fifth child. Two of the older children were placed in mother's home in hopes of reunification, but domestic violence between mother and her boyfriend in the

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[1] Mother had older children not at issue in this case. For the sake of clarity, we discuss the facts as though the five children declared dependent in this proceeding are mother's only children.

children's presence resulted in (1) their removal; (2) a dependency petition with respect to the new baby; and (3) a subsequent petition with respect to the older four children. These petitions were also sustained. Mother and father both failed to reunify.[2] At some point, father stopped participating in the proceedings entirely; the Department and father's counsel both lost contact with him.

On July 30, 2018, the dependency court terminated both parents' parental rights. Mother filed a timely notice of appeal.

2. *ICWA Facts and Procedure*

As we have noted, the only issue mother raises on appeal is the court's compliance with ICWA with respect to the three middle children. When the children were first detained in March 2015, mother reported that she had no known Indian ancestry.[3]

The Department's reports state that the Department's investigator spoke with father on April 8, 2015 "to obtain the ICWA information," but does not state what information father gave the investigator. It then states, "Then, on 4/14/15, [the investigator] [c]alled father again and he stated that he didn't get in contact with his father (paternal grandfather) but he hasn't

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[2] The fathers of the eldest and youngest children play no part in this appeal.

[3] At one point, mother stated that she may have Indian ancestry through her mother, and suggested the Department ask her uncle. She gave her uncle's name and telephone number. At the detention hearing, the court ordered the Department to contact her uncle to investigate the claim. Thereafter, mother reported that she had no Indian ancestry, and the matter was dropped. On appeal, mother does not assert any error in connection with the Department's investigation of her original claim of possible Indian ancestry.

heard from him. He said his father lives in Oklahoma and they had a disaster out there."

On April 15, 2015, father filled out form ICWA-020, the Parental Notification of Indian Status. On the form, he checked the box stating, "I have no Indian ancestry as far as I know," but added, "I have heard from family there may be some, but I have no details at this time." At the arraignment hearing held that day, the court asked father's counsel if father had any American Indian heritage. Counsel responded, "To his knowledge, I did file an ICWA-020. He's heard from the family that there may be some family members he doesn't know on that side of the family, so he did check and he has, as far as he knows, if these – we may need further information. He will let my staff and the social worker know immediately." The court concluded that it did not have reason to know that ICWA applied, but directed the parents to keep "the Department, their Attorney and the Court aware of any new information relating to possible ICWA status."

On April 23, 2015, the Department brought the matter on calendar to address ICWA. The Department provided last-minute information to the court, stating that the investigator had spoken to father "on two prior occasions regarding ICWA information and he was trying to call his father to get the information. On 4/21/15 [the investigator] did a follow up call with father and he stated that he doesn't have his father's telephone number. He stated the number must be disconnected and he does not have another phone number for him. Father reported that Paternal Grandfather resides in Tulsa, Oklahoma. [The investigator] inquired about Uncles or other paternal relatives that may have the informatio[n] and father stated that he has met his Uncles when he was a kid, but they all live in

Oklahoma and he is not in contact with them. He met them but they did not stay in contact. Father does not have a way to contact the paternal relatives that may or may not have Native American heritage. Father does not have enough information to fill out an ICWA form 030 [the ICWA notice form]. At this time, there is no reason to know that father has any Native American heritage. The Department request[s] that the court make an ICWA finding."

A court reporter was present at the April 23, 2015 ICWA hearing, but despite a diligent search for her notes, they could not be found. Thus, we have no record as to what was said at the hearing. The court's minute order, however, states that the court had no reason to know the children are Indian children within the meaning of ICWA, so did not order notice to any tribe. The order again states, "Parents are to keep the Department, their Attorney and the Court aware of any new information relating to possible ICWA status."

No further ICWA information is indicated in the record; future Department reports simply referred back to the court's April 23, 2015 finding that ICWA did not apply.

The next status report was filed by the Department on July 1, 2015. By that time, mother was no longer living with father. By the October 2015 status report, they were living together again, in the paternal grandmother's home, but they had not reconciled their relationship. Indeed, mother had planned to move in with her new boyfriend. She ultimately did so; father remained with his mother.

Father continued to struggle with alcoholism, and an April 2016 Department report indicated that he "continues to fail to

comply with all court orders." Father's reunification services were terminated on September 15, 2016.

At a January 5, 2017 hearing, father's counsel represented that father was "not engaging in contact with the Department." Father arranged a visit with his children in April 2017, but did not arrange any more. A May 2017 Department report indicated that, in trying to give notice of an upcoming hearing to father in person, the Department discovered that the address on file for father belonged to a paternal aunt, not father. The report also noted that father "also has another child that is in the system with another Social Worker."

By February 2018, father's counsel admitted he did "not have any current direction" from his client. At the July 30, 2018 hearing under Welfare and Institutions Code section 366.26, where parental rights were terminated, father's counsel again represented, "I have no direction from him [father], despite our office's numerous attempts to reach him."

DISCUSSION

1. *Appealability and Standard of Review*

A parent is not required to appeal a court's adverse ICWA finding at the time it is first made. Instead, a parent may challenge a prior finding of ICWA inapplicability in the course of an appeal from a subsequent order terminating parental rights. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 5.) Thus, mother's appeal is timely.

When, as is the case here, the facts are undisputed, we review independently whether the requirements of ICWA have been satisfied. (*In re J.L.* (2017) 10 Cal.App.5th 913, 918.)

2. *ICWA Requirements*

"ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. [Citations.] For purposes of ICWA, an 'Indian child' is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe. [Citations.]" (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 783.)

There are two separate ICWA requirements which are sometimes conflated: the obligation to give notice to a tribe, and the obligation to conduct further inquiry to determine whether notice is necessary. Notice to a tribe is required, under federal and state law, when the court knows or has reason to know the child is an Indian child. (*Id*. at p. 784.) In contrast, the Department is to make further inquiry if it "knows or has reason to know that an Indian child is *or may be* involved" in the case. (Cal. Rules of Court, rule 5.481(a)(4), emphasis added.) We are concerned here with the duty to inquire.

"[A]lthough ICWA itself does not define 'reason to know,' California law, which incorporates and enhances ICWA's requirements, identifies the circumstances that may constitute reason to know the child is an Indian child as including, without limitation, when a person having an interest in the child, including a member of the child's extended family, 'provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents or great-grandparents are or were a

member of a tribe.' [Citations.]" (*In re Elizabeth M., supra,* 19 Cal.App.5h at p. 783, fn. omitted.)

"Importantly for our purposes, the burden of coming forward with information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. Juvenile courts and child protective agencies have 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child. [Citations.] This affirmative duty to inquire is triggered whenever the child protective agency or its social worker 'knows or has reason to know that an Indian child is or may be involved . . . .' [Citation.] At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. [Citations.]" (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233.) "Just as notice to Indian tribes is central to effectuating ICWA's purpose, an adequate investigation of a family member's belief a child may have Indian ancestry is essential to ensuring a tribe entitled to ICWA notice will receive it." (*In re Elizabeth M., supra,* 19 Cal.App.4th at p. 787.) "ICWA and state law place the duty with the child protective agency in the first instance, not the child or his or her parent, to determine whether additional information exists that may link a child with Indian ancestry to a federally recognized tribe." (*Ibid.*)

3. ICWA Inquiry Obligation Was Satisfied

A parent must make some level of non-speculative showing in order to give rise to a duty of inquiry. In *In re Hunter W.*

(2011) 200 Cal.App.4th 1454, 1468, the mother represented that she may have Indian ancestry through her father and deceased paternal grandfather. She could not identify the tribe and could not provide contact information for her father, nor did she mention any other relative who could provide more information. On appeal, she argued that the Department should have questioned her relatives for more information, but the Court of Appeal found that the information she provided was too speculative to trigger that duty. To the same effect is the recent case of *In re J.L., supra,* 10 Cal.App.5th 913. In that case, the mother's initial response to whether she had Indian ancestry was "Not sure." (*Id*. at p. 916.) The mother's counsel represented that the mother had been repeatedly told by family members that she may have native heritage, but she would research it and let the court and the Department know if she found anything further. (*Ibid.*) On those facts, the trial court found that ICWA did not apply, but elicited the mother's agreement that she would immediately pass along any further information she obtained. (*Id*. at p. 917.) On appeal, the Court of Appeal agreed that ICWA had been satisfied, and the Department need not have conducted further inquiry. The court concluded that the mother's " 'general or vague' " reference to possible Indian heritage was not sufficient to trigger a duty of further inquiry. (*Id*. at p. 923; see also *In re Jonah D.* (2010) 189 Cal.App.4th 118, 123, 125 [grandparent's assertion that she had been informed of Indian ancestry, but could not identify a tribe and did not know of any living relatives who could provide information is too vague to give the court any reason to believe the children might be Indian children].)

Factually, this case is similar to *In re J.L.,* and should reach the same result. While in *J.L.*, the mother said she was

"[n]ot sure" if there was Indian heritage, here father actually denied Indian heritage, but added that he had "heard from family there may be some." Just as the mother in *J.L.* could not identify any relative with heritage, but promised to continue researching and keep the court informed, father here could not contact the paternal grandfather (due to a natural disaster) but his counsel promised to continue researching and report back if anything was discovered. Neither father nor his counsel ever reported any further Indian heritage, nor did they suggest they required the Department's assistance in speaking to father's relatives about it. We conclude father's vague reference to family lore of tribal heritage is insufficient, standing alone, to mandate further inquiry on the part of the Department. (*In re J.L., supra,* 10 Cal.App.5th at p. 923.)

There is some authority suggesting that further inquiry should be made when a vague assertion of tribal heritage is combined with a lead on an obvious, but untapped, source of information. In *In re Andrew S.* (2016) 2 Cal.App.5th 536, the father stated that he may have Indian ancestry on his father's side, but did not know which tribe. He had no further information, and both of his parents were deceased. The Department, however, reported that the father had seven siblings, but made no attempt to contact them regarding the family's possible Indian ancestry. (*Id.* at p. 545.) The Court of Appeal concluded that the Department and dependency court had failed in their duty of inquiry, as "neither the court nor the Department made any effort to develop additional information that might substantiate [the father]'s belief he may have Indian ancestry by contacting his siblings or other extended family members. Both federal and state law require more than has been

done to date." (*Id.* at p. 548.; see also *In re Michael V., supra,* 3 Cal.App.5th at pp. 230-231, 235 [mother had been told that her mother was an Indian, and presently lived in San Diego; the Department should have attempted to locate her].) We do not believe this authority applies in this case. Here, father was apparently in contact with paternal grandfather (who was not alleged to be Native American himself, but only to have knowledge of Indian heritage in the family). Father only lost track of paternal grandfather due to a natural disaster; the record also showed father was in regular contact with (and, at some times, lived with) other paternal relatives. When father was participating in the case, he and his counsel agreed to ask further questions about Indian ancestry and report back if they found anything concrete. On this record, there is no reason to assume that father had been unable to make this inquiry, but that the Department should have done so. We therefore affirm.

DISPOSITION

The order terminating parental rights is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.